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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1941**

## No. 306

JOSEPHINE S. PEARCE, PETITIONER,

*vs.*

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**PETITION FOR CERTIORARI FILED JULY 24, 1941.**

**CERTIORARI GRANTED OCTOBER 13, 1941.**

# SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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—7243

[fol. 1]

**BEFORE UNITED STATES BOARD OF TAX APPEALS**

Docket #96158

JOSEPHINE S. PEARCE, *Petitioner*,

*v.*

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

DOCKET ENTRIES

Appearances:

For taxpayer: Gordon S. P. Kleeberg, Esq.,
For Commissioner: Leonard A. Spalding, Jr., Esq.

1938

Nov. 15—Petition received and filed. Taxpayer notified. (Fee paid)
" 15—Copy of petition served on General Counsel.

1939

Jan. 11—Answer filed by General Counsel.
" 11—Request for Circuit hearing in New York City filed by General Counsel.
" 18—Notice issued placing proceeding on New York calendar. Service of answer and request thereon.
Sept. 19—Hearing set Nov. 13, 1939 at New York City.
Nov. 16—Hearing had before J. E. Murdock. Briefs as per rules. Stipulation of facts filed at hearing.
" 25—Transcript of hearing of 11/16/39 filed.
Dec. 15—Motion for extension of 20 days after Supreme Court decision in the Fitch case to file brief filed by General Counsel.
" 29—Brief filed by taxpayer.

[fol. 2] 1940

Jan. 10—Motion for extension of 20 days after Supreme Court decision in the Fitch case filed by General Counsel. 1/11/40 granted. Both parties.
Feb. 19—Brief filed by General Counsel.
" 20—Copy of brief served on General Counsel.

Mar. 4—Reply brief filed by taxpayer.
June 14—Opinion rendered, John E. Murdock, Div. 3. Decision will be entered for the respondent.
" 15—Decision entered, J. E. Murdock, Div. 3.
Sept. 6—Supersedeas bond in the sum of $1,300.00 approved and ordered filed.
" 12—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by taxpayer.
" 13—Proof of service filed by taxpayer.
Oct. 16—Agreed præcipe for record filed with proof of service thereon.

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[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION.—Filed Nov. 15, 1938

The above named petitioner by Gordon S. P. Kleeberg, Esq., attorney at law of the State of New York, hereby respectfully petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:A:1.JES-90D) dated November 2nd, 1938, and as a basis of her proceeding, respectfully alleges as follows:

1. The petitioner is a divorced woman, having obtained a divorce from her husband by decree dated January 13, 1917, and resides at 126 East 54th Street, in the Borough of Manhattan, City, County and State of New York.

2. The notice of alleged deficiency, a copy of which is attached and marked Exhibit "A" was mailed to the petitioner on November 2, 1938.

3. The tax in controversy is an alleged additional income tax liability or deficiency for the calendar year ending December 31, 1935 in the sum of $310.20 and for the calendar [fol. 4] year ending December 31, 1936, in the sum of $327.96.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

In determining the tax liability of the petitioner for the years 1935 and 1936, the Commissioner has erroneously

held that petitioner should be taxed upon income received from an annuity amounting to Six thousand ($6000) dollars in each of the taxable years ending respectively December 31, 1935 and December 31, 1936, which annuity was created for the sole purpose of insuring to petitioner, Five hundred ($500) dollars alimony per month during her life.

5. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) In 1913, the taxpayer's husband, William G. Pearce, then living separate and apart from petitioner, but not legally divorced or separated by any decree of any court, set up a trust for his wife. The agreement recites that the parties were separated, and provided for monthly payments for her separate maintenance and support until the death of his wife (petitioner) or judgment of divorce, whereupon the trust was to terminate.

Sometime prior to January 13, 1917, and in the year 1915, petitioner moved from her then residence in New York, to the State of Texas, with the intention of acquiring a residence there, and suing her husband, the said William G. Pearce for a divorce.

(b) A supplemental agreement dated December 7th, 1916 (executed during the proceedings of a divorce suit then pending in the courts of Texas between the parties) provided that the obligation of the husband under the trust [fol. 5] agreement of 1913 above referred to, should terminate whenever he should have purchased for the benefit of his wife, the plaintiff in that divorce suit, an annuity under which, in lieu of the monthly payments provided for in the agreement of 1913, for her separate maintenance and support, she would receive five hundred ($500) dollars monthly as alimony, for life.

(c) One month later, and on January 13th, 1917, a decree of divorce was entered in the wife's (petitioner) favor, in a court in the State of Texas, having jurisdiction of the parties.

(d) On May 1, 1917, William G. Pearce, petitioner's husband, purchased for $82,953.53, an annuity for the benefit of his divorced wife, petitioner, Josephine S. Pearce, whereby she was to receive the sum of Five hundred ($500) dollars a month for her maintenance and support (in lieu of any other alimony) for the rest of her life, the first monthly

payment to be made June 1, 1917, and upon the death of the annuitant (petitioner), all liability of the Travelers Insurance Company from whom the annuity had been purchased, should cease, with no payment to be made at or after that time of principal or income. Petitioner had no power of disposition over the corpus of this fund during her life or by testamentary disposition or otherwise. The Actuaries of the Insurance Company figured her expectancy of life at $82,953.53 to return $500.00 monthly.

(e) The above mentioned William G. Pearce is still alive.

Wherefore, petitioner respectfully prays that this Honorable Board may hear the proceeding and determine that there is no deficiency due from the petitioner for the years 1935 and 1936.

Petitioner also respectfully prays that this case may [fol. 6] be placed on the Circuit Division of this Honorable Board and heard in the City of New York.

Josephine S. Pearce, Petitioner.

Gordon S. P. Kleeberg, Counsel for Petitioner, 300 Madison Avenue, Manhattan, New York, N. Y.

*Duly sworn to by Josephine S. Pearce. Jurat omitted in printing.*

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[fol. 7] EXHIBIT "A" TO PETITION

Treasury Department

Office of Commissioner of Internal Revenue

Nov. 2, 1938.

Mrs. Josephine S. Pearce
126 East 54th Street,
New York, New York.

MADAM:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1935 and 1936 discloses a deficiency of $638.16 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates [fol. 8] thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, By (S) John R. Kirk, Deputy Commissioner.

Enclosures: Statement Form of Waiver.

Statement

IT:A:1
JES-90D

Mrs. Josephine S. Pearce,
126 East 54th Street,
New York, New York.

Tax Liability for Taxable Years Ended December 31, 1935 and 1936

Income Tax

| Year | Liability | Assessed | Deficiency |
|---|---|---|---|
| 1935 | $310.20 | None | $310.20 |
| 1936 | 327.96 | None | 327.96 |
| Total | $638.16 | | $638.16 |

In making this determination of your income tax liability careful consideration has been given to the internal revenue auditor's report dated December 22, 1937 and to your representative's letter dated January 22, 1938.

[fol. 9] A copy of this letter has been mailed to your representative, Mr. William A. Cambell (sic) C. P. A. and Gordon S. P. Kleeberg, Esq., 51 East 42nd Street, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustment to Net Income

1935

| | |
|---|---|
| Net income as disclosed in return | $1,444.00 |
| Additional income: | |
| (a) Annuity | 6,000.00 |
| Net income adjusted | $7,444.00 |

Adjustment to Net Income

1936

| | |
|---|---|
| Net income as disclosed in return | $1,444.00 |
| Additional income: | |
| (a) Annuity | 6,000.00 |
| Net income adjusted | $7,444.00 |

Explanation of Adjustment

(a) With respect to the annuity you are advised that since annual payments received by you are in excess of the cost of the annuity, the entire payment of $6,000.00 received by you in each of the above taxable years is held by the Bureau to be taxable.

[fol. 10] Computation of Tax

1935

| | | |
|---|---|---|
| Net income adjusted | | $7,444.00 |
| Less: | | |
| Personal exemption | | 1,000.00 |
| Surtax net income | | $6,444.00 |
| Less: | | |
| Dividends | $444.00 | |
| Earned income credit (10% of $3,000.00) | 300.00 | 744.00 |
| Net income subject to normal tax | | $5,700.00 |
| Normal tax at 4% on $5,700.00 | | $ 228.00 |
| Surtax on $6,444.00 | | 102.20 |
| | | $ 330.20 |

| | |
|---|---|
| Less: | |
| Income tax paid at source | 20.00 |
| Correct income tax liability | $ 310.20 |
| Income tax assessed, original account #662602 | none |
| Deficiency of income tax | $ 310.20 |

Computation of tax

1936

| | |
|---|---|
| Net income adjusted | $7,444.00 |
| Less: | |
| Personal exemption | 1,000.00 |
| Surtax net income | $6,444.00 |
| [fol. 11] Less: | |
| Earned income credit (10% of $3,000.00) | 300.00 |
| Net income subject to normal tax | $6,144.00 |
| Normal tax at 4% on $6,144.00 | 245.76 |
| Surtax on $6,444.00 | 102.20 |
| | $ 347.96 |
| Less: | |
| Income tax paid at source | 20.00 |
| Correct income tax liability | $ 327.96 |
| Income tax assessed, original, account #664793 | none |
| Deficiency of income tax | $ 327.96 |

BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER—Filed January 11, 1939

The respondent, by his attorney, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, for answer to the petition heretofore filed in this proceeding, admits and denies as follows:

[fol. 12] 1. Admits that the petitioner resides at 126 East 54th Street, in the Borough of Manhattan, City, County and

State of New York, but denies the remaining allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1935 and 1936; denies the remaining allegations contained in Paragraph 3 of the petition.

4. Denies that the Commissioner erred as alleged in Paragraph 4 of the petition.

5. (a) through (e) Denies the allegations of fact set forth in subparagraphs (a), (b), (c), (d), and (e) of Paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore it is prayed that the taxpayer's appeal be denied and the deficiency as shown in the deficiency notice be in all things approved.

(Signed) J. P. Wenchel, ECA. Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

E. O. Hanson, Division Counsel. Leonard A. Spalding, Jr., Special Attorney, Bureau of Internal Revenue. LAS/drc 1/10/39.

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[fol. 13] Before United States Board of Tax Appeals

Stipulation of Facts—Filed at Hearing November 16, 1939

It is Hereby Stipulated and Agreed by and between the parties hereto by their respective attorneys, that the following is a correct statement of the facts involved in the above proceeding, and may be introduced in evidence by either party without further proof thereof:

1. Petitioner is alive, and resides at 126 East 54th Street, Manhattan, New York City.

2. William G. Pearce, former husband of petitioner, is alive and resides at 580 Park Avenue, Manhattan, New York City.

3. Petitioner and said William G. Pearce were lawfully married at Sedalia, Missouri, and continued to live together as husband and wife until on or about November 7th, 1913, at the City of New York, State of New York, when, by reason of the treatment and conduct of said William G. Pearce toward petitioner, she was compelled to permanently abandon him since which time they have not lived together as husband and wife.

No children were born of the said marriage of the petitioner and William G. Pearce either before or after the said decree of divorce hereinafter referred to.

4. Thereupon, in 1914, petitioner moved to the home of a cousin in Dallas, Texas, and continuously resided there, [fol. 14] while William G. Pearce, her husband, resided in New York City.

5. That thereafter and on December 9th, 1916, petitioner instituted a suit for divorce against said William G. Pearce in the District Court of Dallas County, State of Texas, which received docket number 24597, and the said William G. Pearce duly entered his personal appearance in said law suit and waived the issuance of process and service thereof upon him. A true copy of such appearance dated December 16, 1916, is hereunto annexed, marked Exhibit "A", and the only prayer in said petition contained, is as follows:

"Wherefore, plaintiff prays the court that defendant be cited to appear and answer this cause of action, and that upon final hearing she be given judgment dissolving the said marriage relation, and for all costs of suit."

6. That thereafter the said William G. Pearce also appeared in said proceedings by attorney and such proceedings were regularly and duly had that on January 13, 1917, a decree of absolute divorce was duly entered in favor of petitioner against said William G. Pearce in said law suit docket number 24597, a true copy of which decree, is hereunto annexed, marked Exhibit "B".

7. On December 6, 1913, at the City of New York, State of New York, while the petitioner was living separate and apart from her said husband, but not legally divorced or separated by any decree of any court, the said William G.

Pearce set up a trust for his wife with Broadway Trust Company, as Trustee, whereby she was to receive $350.00 a month for her life. A true copy of said Trust Agreement is hereunto annexed, marked Exhibit "C".

[fol. 15] 8. On December 7th, 1916, petitioner and said William G. Pearce executed a "Supplemental Agreement" dated that date, a true copy of which is hereunto annexed, marked Exhibit "D".

9. That pursuant to the terms of the Supplemental Agreement, Exhibit "D" above referred to, the said William G. Pearce on May 1, 1917, purchased from Travelers Insurance Company of Hartford, Connecticut, for $82,953.53, a straight life annuity No. 407689, for the benefit of his divorced wife, petitioner herein, of which annuity contract she is presently possessed today and from which she has been receiving $500.00 a month since June 1st, 1917, the date of the first payment stated in the annuity contract and all parties to said supplemental agreement complied with all the terms and conditions on their part required to be performed.

10. A true copy of said an-uity contract is hereunto annexed, marked Exhibit "E".

Gordon S. P. Kleeberg, Counsel for Petitioner. J. P. Wenchel, ECA, Chief Counsel for the Bureau of Internal Revenue.

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[fol. 16] EXHIBIT "A" TO STIPULATION OF FACTS

In the District Court of Dallas County, Texas, For and in the 68th Judicial District of Texas

No. 24597-C

JOSEPHINE S. PEARCE

*v.*

WILLIAM G. PEARCE

I, William G. Pearce, defendant in the above styled and numbered cause, do waive the issuance of process and service thereof, and do enter my appearance in said suit and do hereby agree that said case may be taken up, heard



and disposed of at any time that may suit the convenience of the court.

William G. Pearce.

Subscribed and sworn to before me, this the 16th day of December, A. D. 1916. Alexander L. Hillyard, Notary Public in and for New York County, New York, Notary Public, Kings Co. Certificate filed in New York Co.

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[fol. 17] EXHIBIT "B" TO STIPULATION OF FACTS

24597

JOSEPHINE S. PEARCE

VS.

WILLIAM G. PEARCE

Entered As of January 13, 1917

On this day coming on to be heard the above entitled and numbered cause, and the plaintiff appearing in person and by attorney, and the defendant William G. Pearce having also entered his personal appearance and appearing also by his attorney, and the Jury was waived by both parties, who announced ready for trial, and the Court having heard the pleadings, evidence and argument of Counsel, is of the opinion that the material allegations in plaintiff's petition are true.

It is, therefore, ordered, adjudged and decreed by the Court that the bonds of Matrimony heretofore existing between said plaintiff and defendant be, and the same are hereby annulled and dissolved and that the said plaintiff be and she is hereby divorced from the said defendant.

It is further ordered by the Court that said plaintiff do have and recover of said defendant all costs in this behalf expended, for which she may have her execution. It is further ordered that execution shall issue in favor of the offices of the Court against each party respectively for the costs by her or him in this behalf incurred.

W. F. Whitehurst, Judge, 68th District Court.

[fol. 18] THE STATE OF TEXAS,
County of Dallas:

I, Geo. W. Harwood, Clerk of the District Courts, in and for the County of Dallas, and State of Texas, do hereby certify, that the above and foregoing is a true and correct copy of Divorce Decree in the above numbered and styled cause, as the same appears of record in Book 13 page 422, of the Minutes of the 68th Judicial District of Texas, in and for Dallas County.

Witness my official seal and signature, at office in the City of Dallas, Dallas County, Texas, on this the 11th day of Feb. 1935.

Geo. W. Harwood, Clerk of the District Courts, Dallas County, Texas, By Thomas Goforth, Deputy.

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EXHIBIT "C" TO STIPULATION OF FACTS

Memorandum of Agreement made this sixth day of December, 1913 by and between William G. Pearce, of the City of New York, party of the first part, Josephine S. Pearce, party of the second part, and Broadway Trust Company, a corporation organized under the laws of the State of New York, and its successor or successors, as trustee, party of the third part, hereinafter referred to as "trustee"; witnesseth:

Whereas, the party of the first part, husband of the party of the second part, now resides at the Metropolitan Club, in the City of New York, and has resided there since on or about November 7, 1913, and the party of the second part, [fol. 19] the wife of the party of the first part, is now residing temporarily in the City of New York, but separate and apart from the party of the first part, and is about to remove from said city; and

Whereas, the said parties of the first and second parts have permanently separated from each other, and are now and have been since said last mentioned date continually living separate and apart from each other; and

Whereas, the party of the first part desires to make provision, to the extent of Three hundred and fifty dollars ($350) a month, through the party of the third part as trustee, for the separate support and maintenance of the

party of the second part, under certain terms and conditions mutually agreeable to the parties of the first and second parts, and hereinafter set forth;

Now, therefore, each of the parties hereto in consideration of the mutual promises hereinafter contained and in further consideration of the sum of One Dollar each to the other in hand paid, receipt whereof is hereby acknowledged, do agree as follows:

1. The party of the first part agrees to cause to be transmitted to the party of the second part through the trustee, the sum of Three hundred and fifty dollars ($350) on the first day of each month while this agreement is in force and effect.

2. The party of the first part agrees to and does hereby assign and deliver in trust simultaneously with the execution of this agreement, to the trustee, the following securities, and does hereby authorize the trustee to cause said securities to be transferred to the name of the party of the third part as trustee:

[fol. 20] 700 shares of the common capital stock of Griffin Wheel Company, a corporation organized and existing under the laws of the State of Massachusetts,

said securities being so assigned and delivered in trust to the trustee for the following purposes:

(a) To receive the dividends, interest, or other payments, now or hereafter to become due and payable thereon, whether by way of earnings or otherwise.

(b) To disburse the proceeds received by reason of holding said securities, in the manner, at the times, and to the parties, as provided in this agreement.

(c) To reassign and deliver to the party of the first part or his personal representatives, said securities or any securities substituted therefor as hereinafter provided, upon the termination of this agreement.

3. The party of the first part agrees, in the event that the trustee shall not, upon the 25th day of any month, have in hand the sum of Three hundred and fifty dollars ($350), income from said securities, but he will, upon due notification from the trustee, pay to the trustee on or before the

first day of the month succeeding said 25th day, a sum sufficient to increase the moneys in possession of said trustee, subject to the provisions of this agreement, to the sum of Three hundred and fifty dol-ars ($350).

4. The party of the first part agrees to assign and deliver other securities in trust to the trustee for the purposes hereinbefore stated when duly demanded by the trustee under the provisions of paragraph eleven of this agreement.

[fol. 21] 5. The party of the first part agrees to pay all charges of the trustee for any services rendered and disbursements incurred by the trustee under the terms of this agreement.

6. The party of the second part agrees to accept the provisions for payments to be made to her contained in this agreement in lieu of any and all inchoate rights of dower or any other rights now possessed by her, or which she may hereafter possess in the real estate of the party of the first part, or in any property, whether real or personal, now jointly owned by the parties of the first and second parts, and in lieu of any and all claims for support and maintenance and demands of every kind and character; and the party of the second part hereby agrees to execute and deliver on demand any and all instruments that may be needful or proper for carrying into effect any of the provisions of this paragraph; and the party of the second part agrees that she will not at any time hereafter contract any debt or debts in the name of the party of the first part or for which he or his estate shall or may be liable or answerable.

7. The party of the second part agrees that, whenever, in any calendar year the trustee shall have received, under the provisions of this agreement, an amount in excess of four thousand two hundred dollars ($4200), the trustee shall pay such excess to the party of the first part; provided, however, that any receipts by the trustee from the sale of any of the securities under the provisions of paragraph eleven of this agreement shall not be considered in estimating said excess.

8. The party of the second part agrees that the party of the first part may substitute other securities of equal or greater value in the place of any securities assigned and [fol. 22] delivered to the trustee under the terms of this

agreement, upon the terms and conditions provided in para-*para*graph twelve of this agreement.

8a. The party of the second part further agrees that so long as the party of the first part shall perform the obligations assumed hereunder, the trustee shall, upon demand, of the party of the first part execute a proxy or proxies in favor of the party of the first part, permitting said last mentioned party to vote in his discretion upon all the certificates of stock held by the trustee hereunder.

9. The Trustee agrees:

(1) To hold possession under the terms of this agreement of the securities delivered to it by the party of the first part hereunder.

(2) To receive dividends, interest or other payments upon said securities and the moneys paid by the party of the first part under the provisions of paragraph three of this agreement.

(3) To pay the proceeds thereof in the following manner:

(a) So much as may be necessary and so far as the moneys received under this agreement will suffice, to liquidate the obligations assumed herein by the party of the first part.

(b) To the party of the first part any excess of moneys received by the trustee, such excess to be determined by the provisions of paragraph seven of this agreement.

10. The trustee agrees in the event that it has not on hand, under the terms of this agreement, the sum of Three hundred and fifty ($350) upon the 25th day of any month, [fol. 23] forthwith to serve notice of such fact in writing upon the party of the first part, and shall demand that the party of the first part shall pay over to the trustee the amount of such deficiency on or before the first day of the month succeeding.

11. The trustee agrees in the event that the party of the first part, after due notification of any such deficiency by the trustee, shall not have duly placed the trustee in funds wherewith to make any payment due the party of the second part, the trustee may, on request of the party of the second part, sell at public auction the securities trans-

ferred to it by the party of the first part, or such portion thereof as will realize an amount equal to such deficiency, and may apply the proceeds of such sale in liquidation of the obligations assumed herein by the party of the first part. In the event that the trustee shall, under the provisions of this paragraph, exercise its right to sell any of the securities assigned and delivered to it in trust herein, the trustee shall immediately thereafter mail a demand in writing, addressed to the party of the first part requiring said party forthwith to assign and deliver to said trustee in trust other security equal in market value to the difference between the value of the security sold as fixed by said sale and the par value of said security, less such deficiency.

12. The trustee agrees that, in the event the party of the first part shall notify the trustee in writing that he desires to substitute other securities in place of any of the securities delivered to the trustee hereunder, forthwith to mail a copy of such notification to the party of the second part. In the event that the party of the second part is in doubt regarding the sufficiency of the security proposed to be substituted, she shall, within ten days after the [fol. 24] date of said notice, notify the trustee in writing, of the name of some certain trust company in the City of New York or Chicago, Ill., to whom she desires the question of the value of said security to be submitted. Upon receipt from the party of the second part of the name of said trust company, the trustee shall request in writing, the opinion of said trust company upon the fair value of the securities offered in substitution. Upon receipt from said trust company of its opinion of the fair value of said securities, the trustee shall exchange said securities providing the securities proposed to be substituted are valued by said trust company at a value equal to or greater than the securities which the party of the first part has requested be reassigned and delivered to him. In fixing the relative values of said securities the trustee shall fix the value of the securities assigned and delivered herein at their par value, and the value of the securities proposed to be substituted at the valuation placed upon them by the trust company selected by the party of the second part. In the event that the trustee shall not have received from the party of the second part the name of a trust company

to whom the question of the value of said securities may be submitted, within thirty days after said trustee has duly notified the party of the second part that the party of the first part has proposed to substitute securities as aforesaid, the party of the second part shall be deemed to have consented to such substitution and the trustee shall make such substitution within a reasonable time thereafter.

13. In the event that the party of the second part shall have contracted any debt or debts subsequent to the execution of this agreement, and judgment or judgments therefor shall have been obtained against the party of the first part, or his estate, all the parties hereto agree that the [fol. 25] trustee shall satisfy said judgment or judgments out of the moneys payable to the party of the second part under the terms of this agreement, and the trustee shall withhold all payments hereunder to the party of the second part until said judgment shall be fully satisfied and discharged, and until the trustee shall have received a satisfaction or satisfactions of said judgment or judgments.

14. All of the parties hereto agree that this agreement shall remain in force and effect during the life of the party of the second part, unless prior to the death of said party she shall have obtained a decree of absolute divorce from the party of the first part, in which event the parties hereto shall be released from all obligations thereunder.

15. All of the parties hereto agree that whenever in this agreement it is provided that any notification in writing shall be sent by any of the parties hereto, said notification shall be sent by registered mail to this following addresses:

The party of the first part: 30 Church Street, New York City;

The party of the second part: % C. O. Maas, 87 Nassau Street, New York City;

The party of the third part: Woolworth Building, New York City.

In the event that the party of the first part or the party of the second part, desires notifications to be forwarded to respective addresses other than those above set forth, notifications of such new addresses shall be given by registered mail to the trustee, and the trustee shall not be obli-

gated to forward notifications to said changed addresses until five days have elapsed after the receipt of said notifications of change.

[fol. 26] 16. All the parties hereto agree that this agreement shall not be deemed to be terminated until a duly authenticated copy of a public record either of the death of the party of the second part, or of the judgment of absolute divorce against the party of the first part shall be filed with the trustee herein.

17. All of the parties hereto agree that in the event this agreement shall cease and determine in either of the manners hereinbefore set forth, the trustee shall reassign and deliver to the party of the first part, his executors, administrators or assigns, the securities assigned by him in trust to the trustee, and all moneys received by or paid to the trustee and not yet expended or due to be expended under the terms of this agreement.

18. The trustee shall not be liable, either to the party of the first or second parts, for any act or omission providing it acts in good faith.

19. All of the parties hereto agree that this agreement shall bind the executors, administrators, successors, and assigns of the respective parties hereto.

In Witness Whereof, all of the parties hereto have affixed their hands and seals, in triplicate, in the City of New York on the day and year first above written.

William G. Pearce, L. S.; Josephine S. Pearce, L. S.; Broadway Trust Company, by John Williams, Treas. (Seal.)

Attest: G. A. Gentes, Secretary.

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[fol. 27] State of New York,
County of New York, ss:

On this 6th day of December 1913, before me personally came John Williams who being by me duly sworn, did depose and say, that he resides in City of New York, that he is the treasurer of Broadway Trust Company, the corporation described in and which executed the foregoing

instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Ed. E. McMahon, Jr., Notary Public, N. Y. Co. No. 2732; New York Register, No. 5084. Term expires March 30, 1915. (Seal.)

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EXHIBIT "D" TO STIPULATION OF FACTS

Memorandum of Supplemental Agreement made this 7th day of December, 1916, by and between William G. Pearce, of the City of New York, party of the first part, Josephine S. Pearce, party of the second part, and Broadway Trust Company, a corporation organized under the laws of the State of New York, and its successor or successors, as trustee, party of the third part, hereinafter referred to as "trustee", witnesseth:

Whereas, the parties hereto entered into an agreement on the 6th day of December, 1913, by the provisions of which party of the first part deposited with trustee certain securities the income from which was, up to the amount of Three Hundred and Fifty Dollars ($350) a month to [fol. 28] be paid by trustee to party of the second part during her life, and party of the first part agreed in the event the said deposited securities did not yield an income at least equal to said monthly payments due to party of the second part under said agreement, to pay to trustee, when duly notified, the amount of such deficiency; and

Whereas, party of the first part is willing to deposit additional securities with the trustee and to provide for an increase in monthly payments to party of the second part so that such total payments shall equal Five Hundred Dollars ($500) a month, provided, in consideration thereof, party of the second part agrees that the obligations of the party of the first part and trustee to the party of the second part under said agreement of December 6th, 1913, and under this supplemental agreement shall terminate whenever party of the first part shall have purchased for the benefit of party of the second part and party of the second

part shall have received from trustee an annuity agreement issued by a specified insurance company, by the terms of which annuity agreement said insurance company binds itself to pay to party of the second part during her life the sum of Five hundred dollars ($500) monthly,

Now, therefore, each of the parties hereto, in consideration of the mutual promises hereinafter contained, and in further consideration of the sum of one dollar, each to the other in hand paid, the receipt whereof is hereby acknowledged, do agree to the following modifications of said agreement dated December 6th, 1913:

I. In paragraph numbered "1" upon page 2 of said agreement, in lines 3 and 4 of said paragraph "Three hundred and fifty dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor.

[fol. 29] II. In paragraph numbered "2" upon page 2 of said agreement, in line 7 of said paragraph the figures "700" are stricken out and the figures "1000" are substituted therefor.

III. In paragraph numbered "3" upon page 2 of said agreement, in lines 3 and 4 of said paragraph "Three hundred and fifty Dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor; and in lines 9 and 10 of said paragraph "Three hundred and fifty Dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor.

IV. In paragraph numbered "7" upon page 3 of said agreement, in line 4 of said paragraph "Four thousand two hundred dollars ($4200)" is stricken out and "Six thousand Dollars ($6000)" is substituted therefor.

V. In paragraph numbered "10" upon page 4 of said agreement, in line 3 of said paragraph "Three hundred and Fifty Dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor.

VI. Paragraph 14 of said agreement, and all of the same is entirely stricken out, and the following substituted therefor:

All of the parties hereto agree that this agreement shall remain in force and effect during the life of the party of the second part, unless prior to the death of said party,

the party of the first part, or his representatives shall have purchased, and shall have deposited with the trustee herein an annuity agreement in standard form of one of the following insurance companies, to pay to the party of the second part during her life upon a day certain in each month the sum of Five Hundred Dollars ($500):

[fol. 30] Aetna Life Insurance Company,
The Travellers Insurance Company,
Metropolitan Life Insurance Company,
The Equitable Life Assurance Society of the United States,
The Mutual Life Insurance Company of New York,
New York Life Insurance Company.

VII. Paragraph numbered "16" upon page 7 of said agreement is stricken out and the following is substituted therefor:

16. All of the parties hereto agree that this agreement shall terminate when a duly authenticated copy of a public record of the death of the party of the second part shall have been filed with the trustee herein or when an annuity agreement as described in paragraph "VI" of this supplemental agreement shall have been deposited with the trustee herein.

VIII. In paragraph numbered "17" upon page 8 of said agreement, the following is added at the end of said paragraph:

And in the event an annuity agreement shall have been deposited with the trustee herein, as provided in paragraph "VI" of this supplemental agreement, said annuity agreement shall forthwith be transmitted by the trustee to the party of the second part.

IX. It is further agreed that nothing in this supplemental or in the aforesaid original agreement contained shall be construed as relieving the party of the first part from his personal obligation which is herewith distinctly assumed by him during the life of this agreement to pay or cause [fol. 31] to be paid unto the party of the second part the sum of $500 during every month and that such personal obligation shall only cease and determine in the event that an annuity agreement, as hereinabove provided, shall have been deposited with the trustee herein.

In witness whereof, all of the parties hereto have affixed their hands and seals, in triplicate, in the City of New York on the day and year first above written.

Witness as to William G. Pearce:
Alexander L. Hillyard.

Witness as to Josephine S. Pearce:
Charles O. Maas.

William G. Pearce. (L. S.) Josephine S. Pearce. (L. S.) Broadway Trust Company, by John Williams, Treas.

Attest:
Herman W. Willis.

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of January 1917 before me personally came John Williams who being by me duly sworn did depose and say, that he resides in Montclair, N. J., that he is the Treasurer of Broadway Trust Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors [fol. 32] of said corporation, and that he signed his name thereto by like order.

Herman W. Willis, Notary Public, Kings Co.; Kings County Clerk's No. 116; Kings County Register's No. 7008; Certificate filed in N. Y. County; N. Y. County Clerk's No. 28; N. Y. Register's No. 7055. Term expires March 30th, 1917.

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EXHIBIT "E" TO STIPULATION OF FACTS

Number 407689 Description Life Annuity

The Travelers Insurance Company
of Hartford, Connecticut

| Amount | Premium |
|---|---|
| $500 Monthly | $82,953.50 |

In Consideration of Eighty-two Thousand Nine Hundred Fifty-three 50/100 Dollars, paid to the Company for the purchase of a annuity on the life of Josephine S. Pearce

(hereinafter called the Annuitant) of New York, County of New York in the State of New York does hereby promise to pay to the Annuitant or her assigns Five Hundred Dollars on the First day of each month in each and every year during the natural life of the Annuitant, upon receipt [fol. 33] and approval by the Company of proof that the Annuitant is living on each of such days, the first payment to be made on the First day of June 1917.

This annuity is granted and accepted upon the Declaration of William G. Pearce, the applicant, that the Annuitant was born on the Ninth day of December 1861.

In Witness Whereof, The Travelers Insurance Company has caused these presents to be signed by its President and a Secretary, at Hartford, Conn., this First day of May 1917.

C. Butler, President.

J. S. Scott, Department Secretary.

[Endorsement on Back]

Life Annuity

No. 407689

The Travelers Insurance Company
Hartford, Connecticut

Annuity during the Life of
Josephine S. Pearce

When Payable
1st Day of each Month.

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[fol. 34] BEFORE UNITED STATES BOARD OF TAX APPEALS

Income—Obligation of Husband to Support Wife.—Income which the petitioner received under an annuity contract purchased for her by a former husband from whom she was divorced in Texas, was taxable to her in the absence of evidence showing that there was some continuing liability on the part of her husband to support or maintain her.

*Gordon S. P. Kleeberg, Esq.*, for the petitioner.
*Leonard A. Spalding, Jr., Esq.*, for the respondent.

OPINION—Promulgated June 14, 1940

Murdock: The Commissioner determined deficiencies of $310.29 and $327.96 in the income tax of the petitioner for the calendar years 1935 and 1936. The Commissioner, in determining the deficiency for each year, added to the income disclosed on the return $6,000 representing an amount received by the petitioner during the taxable year under an annuity contract purchased for her benefit by her divorced husband. The propriety of the addition of the $6,000 is the only issue for decision by the Board. The Board adopts as its findings of fact the stipulation of the parties.

[fol. 35] The petitioner and William G. Pearce were married in Misouri and lived as husband and wife until the latter part of 1913, at which time they separated. The husband then set up a trust for his wife's support and mainfenance, under which she was to receive $350 a month. He guaranteed the payments in case the income of the trust was insufficient. Their agreement was changed in December 1916 to provide a monthly income for the petitioner of $500 and to provide that, should the husband purchase for the petitioner an annuity in one of six named insurance companies paying her $500 per month for the remainder of her life, she would agree to the termination of the trust and thereafter her husband would be under no personal obligation to pay or cause to be paid to her any further sum. The petitioner obtained a divorce in Texas in January 1917. The divorce was absolute. They had no children. She sought no alimony and none was provided. The divorce decree made no mention of the agreements between the petitioner and her husband. It contained no provision reserving jurisdiction to later grant alimony or modify the decree in any way. The former husband purchased an annuity in May 1917 from the Travelers Insurance Co., which was one of the six companies named. The annuity was for the payment of $500 monthly to the petitioner for her life. The annuity was transferred to her and she gave the release which she had agreed to give. The trust was

terminated and the corpus was returned to the husband. The petitioner is still in possession of the annuity and received during the taxable years $500 a month.

The sole contention of the petitioner is that the amounts in controversy are not taxable to her because they are taxable to her former husband. The respondent has conceded that the income is not taxable to the former husband. See *William G. Pearce,* Docket No. 98004, heard at [fol. 36] the same time this case was heard. He contends there that the law of Texas, the agreement of the parties, and the annuity have given the divorced husband full discharge and leave no contingent obligation upon him with respect to his wife. He concludes that, under the recent decision of the Supreme Court in *Helvering* v. *Fitch,* 309 U. S.— (1/29/40), the amounts are taxable to the wife, the present petitioner. See also *Helvering* v. *Fuller,*—U. S.— (4/22/40).

Counsel for the petitioner contends that it has not been established in the present record upon clear and convincing proof and beyond mere inferences and vague conjectures that the husband was completely discharged under the laws of Texas by the arrangement made with his wife. He says it may not be assumed that under the laws of Texas the Texas court could not step in, upon failure for some reason of the annuity payments, and require the husband to support the petitioner. This case is different from the *Fitch* case, *supra,* and also from *Helvering* v. *Leonard,*— U. S.—(4/22/40), in one respect which is quite important in so far as this contention of the petitioner is concerned. The difference is that in the *Fitch* and *Leonard* cases the taxpayer seeking to escape the tax was the husband, and any failure of proof or uncertainty was to his disadvantage, whereas here the taxpayer seeking to escape the tax is the wife, and any failure of proof or uncertainty is to her disadvantage. She has failed to show that the determination of the Commissioner is incorrect. The facts, on the contrary, tend to support the determination of the Commissioner.

*Decision will be entered for the respondent.*

[fol. 37] BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION—Entered June 15, 1940

Pursuant to the determination of the Board, as set forth in its Opinion, promulgated June 14, 1940, it is

Ordered and Decided: That there are deficiencies in income tax of $310.20 and $327.96 for the years 1935 and 1936, respectively.

Enter: Entered June 15, 1940.

(S.) J. E. Murdock, Member. (Seal.)

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[fol. 38] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**Petition for Review**—Filed September 12, 1940

*To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:*

Now comes the Taxpayer, petitioner in this cause, Josephine S. Pearce by her counsel, Gordon S. P. Kleeberg, and being aggrieved by the Opinion, Decision and Order of the United States Board of Tax Appeals rendered against her on June 15th, 1940, pursuant to the determination of the said Board as set forth in its opinion promulgated June 14th, 1940, in the case of Josephine S. Pearce, petitioner, against the Commissioner of Internal Revenue, respondent, #96158 on the docket of the said Board, by which the said Board determined that there is a tax deficiency due from said petitioner for the years 1935 and 1936 in the amounts of $310.20 and $327.96 respectively, hereby respectfully submits her petition for a review thereof by the United States Circuit Court of Appeals for the Second Circuit and in support of this, her petition, filed in pursuance of the provisions of Sections 1141 and 1142 of the Internal Revenue Code approved February 10th 1939, respectfully shows to this Honorable Court, as follows:

[fol. 39] I. DESIGNATION OF COURT OF REVIEW

Petitioner on review is an individual and is a resident of the Borough of Manhattan, City, County and State of New York.

Petitioner duly filed a Federal Income Tax Return for the calendar years 1935 and 1936 with the Collector of Internal Revenue for the Third District of New York with offices located in New York City and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

Petitioner being aggrieved by the opinion, decision and order of the United States Board of Tax Appeals in the above entitled cause and the Collector's office to which were made the returns of income tax in respect of which the liability in controversy arises, being located within the Second Judicial Circuit, petitioner desires a review of the said opinion, decision and order in accordance with the provisions of Sections 1141 and 1142 of the Internal Revenue Code approved February 10th 1939, by the United States Circuit Court of Appeals for the Second Circuit.

## II. Prior Proceedings

The Commissioner of Internal Revenue determined a tax deficiency against the petitioner for the taxable years ending December 31st 1935 and December 31st 1936, in the amounts of $310.20 for 1935 and $327.96 for 1936, and sent the petitioner a notice of such alleged income tax deficiency. Subsequently, on November 15, 1938, the petitioner filed with the United States Board of Tax Appeals, a petition appealing from such determination, contesting the entire amount of said deficiency so determined by the Commissioner of Internal Revenue. Thereafter, the Commissioner filed an answer to the said petition admitting the jurisdictional facts set forth therein, and entering an admission of [fol. 40] certain facts and a denial as to other facts set forth in petitioner's contention that there was no deficiency in the said income tax for the calendar years 1935 and 1936.

Thereafter, the matter came on for hearing before the United States Board of Tax Appeals at a Division sitting at New York City, N. Y., on November 16th, 1939. At the hearing, all of the material facts were stipulated and a stipulation of facts with relevant exhibits attached was duly filed with the Board at that time.

Thereafter, briefs were filed with the permission of the Board, a brief for the petitioner, a brief for the Commissioner-respondent, and a reply brief for the petitioner, and thereafter and on June 14th 1940, the Board promulgated its opinion and on June 15th 1940, entered its decision

wherein it was ordered and decided that there was a deficiency in Federal income tax against said petitioner for the calendar year 1935 in the sum of $310.20 and the calendar year 1936 in the sum of $327.96.

On September 6th 1940, the supersedeas bond of petitioner in the amount of $1300.00 was duly approved and filed as of said date.

## III. Nature of Controversy

The controversy involves the taxability to petitioner for the calendar years 1935 and 1936 of moneys which she received from an annuity purchased for her some years previous in substitution of alimony. Briefly, the facts are as follows:

Petitioner and her former husband, William G. Pearce were married in Missouri and lived together until about November 1913 at the City of New York, when and where, because of her husband's conduct, petitioner left him and they have not lived together as husband and wife since. [fol. 41] In 1914, petitioner moved to Texas and resided there continuously and in December 1916, sued her husband for a divorce in the courts of Texas, at which time her husband duly entered his personal appearance as well as appearing by attorney. Such proceedings were thereafter duly had, resulting in a divorce in petitioner's favor by decree entered January 13th 1917.

On December 6th 1913, at the City of New York, while petitioner lived separate and apart from her husband but not legally divorced or separated by any decree of any court, the said William G. Pearce set up a trust for his wife with a Trust Company in New York City, as trustee, whereby she was to receive $350.00 a month for life.

December 7th 1916, two days before the institution of the divorce suit in Texas, a supplemental agreement was executed at the City of New York between husband and wife and pursuant to the terms of that agreement, on May 1st 1917, some months after the entry of the divorce decree in Texas, the said William G. Pearce purchased from Travelers Insurance Company of Hartford, Connecticut, a straight life annuity for the benefit of his divorced wife, petitioner herein, of which annuity contract she is presently possessed today and from which she receives $500.00 a month, since June 1st 1917.

This annuity was created for the sole purpose of insuring to petitioner $500.00 a month for her support and maintenance during her life. The Board of Tax Appeals has held that the moneys received on this annuity for the years 1935 and 1936, ($6000.00 in each year) are taxable to the petitioner. The propriety of the addition of this $6000.00 to such other income as the petitioner from other sources received annually, was the only issue for determination by the Board which adopted as its findings of fact, the stipulation hereinabove referred to, executed between the parties by their respective counsel.

[fol. 42] The sole contention of the petitioner is that the amounts in controversy are not taxable to her, but are taxable to her former husband who is still alive.

## IV. Assignment of Errors

Your petitioner says and respectfully avers, that in the record and proceedings of the United States Board of Tax Appeals in the above-entitled cause, and in the final order entered therein, there is manifest error and for error petitioner respectfully assigns the following:

1. The Board erred in holding that there is a deficiency of tax for the calendar years 1935 and 1936 in the sums of $310.20 and $327.96 respectively or any other amount.

2. The Board erred in holding that the monthly payments received by the petitioner constitute taxable income to her.

3. The Board erred in failing to hold that the original instrument executed in the City of New York, dated December 6th 1913 was an agreement for her support and maintenance and at the time of its execution, was her husband's obligation, and that such obligation continued and was in existence at the time of the execution in the City of New York of the supplemental agreement on December 7th 1916.

4. The Board erred in failing to hold that subsequent to the divorce, the monthly payments continued to be taxable to the husband because they were in discharge of his existing contract obligations entered into on December 6th 1913 and December 7th 1916.

5. The Board erred in failing to hold that the annuity contract with the Travelers Insurance Company of Hart-

ford, Conn., was merely a substitute for the corpus of [fol. 43] the trust in accordance with the terms of both the original and supplemental contracts above referred to and was likewise in discharge of his existing contract obligations thereunder.

6. The Board erred in failing to hold that the investment in the said annuity made by William G. Pearce, the husband, was an investment of *his* and for *his* accommodation and to facilitate the discharge of *his* contract obligation, and in failing to hold that payments on the annuity contract made by the insurance company to petitioner were either return to the said husband of his capital, or if they exceeded the amount of principal paid, were income to him, which, in theory and in effect, he received and paid over to petitioner.

7. The Board erred in holding that there was clear and convincing proof that, under the laws of Texas, the agreement of the parties and the annuity contract gave the divorced husband a full discharge and left no continuing obligation however contingent upon him with respect to his wife.

8. The Board erred in holding that it has not been established in the present record upon clear and convincing proof and beyond mere inferences and vague conjectures that the husband was not completely discharged under the laws of Texas by the arrangement made with his wife.

9. The Board erred in failing to recognize the presumption, in the absence of statutory or interpretative court decisions to the contrary, that the obligation to support remains upon the husband.

10. The Board erred in failing to recognize that the law imposed a continuing obligation on the husband from which, even the wife was powerless to release him.

[fols. 44-45] Prayer

Wherefore, your petitioner prays for review by the United States Circuit Court of Appeals for the Second Circuit of the opinion, decision and order of the United States Board of Tax Appeals, in the above-entitled case, in accordance with the Act of Congress in such cases made and provided, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of said Court certified copies of all and

every of the documents listed and set forth in the Rules adopted by the United States Circuit Court of Appeals for the Second Circuit providing for the presentation of petitions for review of decisions of the United States Board of Tax Appeals, and that this Honorable Court reverse said decision and grant petitioner such other and further relief as may be meet and proper in the premises.

And your petitioner will every pray.

(S.) Gordon S. P. Kleeberg, Counsel for Petitioner, 300 Madison Avenue, Borough of Manhattan, City of New York.

*Duly sworn to by Gordon S. P. Kleeberg. Jurat omitted in printing.*

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[fol. 46] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 96,158

[Same Title]

PRAECIPE—Filed October 16, 1940

*To the Clerk of the United States Board of Tax Appeals:*

You will please prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, with reference to petition for review heretofore duly filed by the petitioner in the above cause on September 12, 1940, a transcript of the record on appeal in the above cause and include therein the following documents or certified copies thereof, to-wit:

(1) Docket entries of all proceedings before the United States Board of Tax Appeals.

(2) Pleadings before the said Board as follows:

(a) Petition for redetermination, including copy of deficiency letter attached thereto.

(b) Answer of respondent.

(3) Stipulation of Facts filed November 16, 1939 with Exhibits A to E inclusive attached thereto.

(4) Opinion of the Board of Tax Appeals promulgated June 14, 1940.

(5) Decision of the Board entered June 15, 1940.

(6) This Praecipe.

[fol. 47] The foregoing you will please prepare, certify and transmit as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Dated, October 8, 1940.

(S.) Gordon S. P. Kleeberg, Attorney for Petitioner, 300 Madison Avenue, Manhattan, New York City.

Service of the foregoing praecipe and agreement thereto is hereby acknowledged.

(S.) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

(S.) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent.

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

No. 155

(Argued April 10, 1941. Decided May 19, 1941)

JOSEPHINE S. PEARCE, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition to review a decision of the Board of Tax Appeals redetermining a deficiency in the income taxes of the petitioner for 1935 and for 1936. Affirmed.

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Gordon S. P. Kleeberg, Attorney for Petitioner; Gordon S. P. Kleeberg, Jacob Greenwald, of Counsel.

Samuel O. Clark, Jr., Assistant Attorney General; for Respondent.

Sewall Key, Michael H. Cardozo IV, Sp. Assistants to the Attorney General.

[fol. 50] CHASE, Circuit Judge:

The petitioner, a resident of the City of New York, is the divorced wife of William G. Pearce who is also a resident of New York City. In 1913, while they were still married but were not living together and were childless, the husband created a trust to provide for the separate support of his wife for life to the extent of payments to her of $350.00 monthly and to be in lieu of all her dower or other rights in any property owned by him or by them together and in discharge of all her claims upon him for support and maintenance. By a supplemental trust agreement made in 1916, the monthly payments were increased to $500.00 and the husband was given the option to terminate the trust and all the claims of the beneficiary wife upon it or upon him by purchasing and delivering to the wife an annuity contract under which one of several designated insurance companies agreed to pay to the wife the sum of $500.00 monthly during her life. Within a few days after the making of this supplemental agreement, the wife, who

had acquired a residence in Texas for that purpose, brought her petition in a Texas court for an absolute divorce. The husband entered his appearance in that action and in due course such a divorce was granted to the wife on Jan. 13, 1917. The decree was silent as to property rights; alimony or support and maintenance of any kind. There was no express retention of jurisdiction for such purposes.

Thereafter, and on May 1, 1917, the husband purchased and delivered to his former wife an annuity in one of the insurance companies mentioned in the supplemental agreement payable to her in the amount of $500.00 each month so long as she lived. He paid a lump sum for the annuity and was entitled to no return of premium or payment of any kind upon her death or at any other time. Payments have been made by the insurance company and received by [fol. 51] the wife regularly ever since in accordance with the terms of the annuity contract.

Neither the husband nor the wife included such payments made to her in the years 1935 and 1936 in their income tax returns. The Commissioner included such payments in the gross income of each for those years and notified each of the deficiency so created. Both appealed to the Board for a redetermination and the two appeals were heard together. The Commissioner conceded at the hearing before the Board that the deficiency determined in the income of the former husband was erroneous and insisted that that in the income of the former wife was correct. The Board redetermined the deficiencies in accord with the position of the Commissioner and the former wife brought this petition to review the redetermination of the deficiency in her income.

The petitioner bases her contention upon what is called the general rule that payments to a divorced wife which discharge a continuing obligation of her former husband to provide for her support are to be included in his taxable income. Douglas v. Willcuts, 269 U. S. 1. And further that the continuing obligation of the husband is to be treated as existing after the divorce decree because of the presumed power, until the contrary is clearly shown, of the divorce court to alter or amend the decree to charge the husband with the support of his former wife whether or not the decree as originally granted included provisions for alimony or property settlements. In support of this part of

the petitioner's argument reliance is put upon Helvering v. Fitch, 309 U. S. 149 and Helvering v. Leonard, 310 U. S. 80.

These principles are, of course, decisive where they are applicable and decision here must depend upon how they apply to a situation where the deficiency as redetermined has resulted not from an inclusion of payments made to the divorced wife in the gross income of the former husband but because they have been put into that of the divorced [fol. 52] wife who actually did receive them. The ordinary rule that gross income includes income "derived from any source whatever" (Sec. 22(a) of the Revenue Act of 1934) is also a general one and to be given effect unless an exception excludes it. Moreover, the determination of the Commissioner is presumptively correct and the burden to show error rests upon the petitioner. Welch v. Helvering, 290 U. S. 111; Wickwire v. Reinecke, 275 U. S. 101.

The Commissioner having determined the deficiency by including the payment in the gross income of the recipient and the Board having upheld the Commissioner, the petitioner now cannot relieve herself from the resulting taxation unless she can show that the decision under review was erroneous. Although she might show error by submitting clear and convincing proof that the payments she received did discharge a continuing obligation of her husband to provide for her support even after the decree of divorce so as to make the rule of Douglas v. Willcuts, supra, applicable in accordance with the decisions in Helvering v. Fitch and Helvering v. Leonard, both supra, she, being faced with the burden of overcoming an adverse decision of the Board, cannot prevail merely by showing that such an obligation upon the husband might have existed under Texas law. She was bound to show with such clarity that it did that the failure of the Board to recognize it and give it effect was error.

In this respect all that does appear, however, is doubt and uncertainty. There seems to be no statutory provision in Texas for decreeing alimony or support and maintenance as such to a divorced wife. Art. 4638 of Vol. 13 Vernon's Texas Civil Statutes provides, at the time a decree of divorce is pronounced, for "a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and

their children, if any." No case has been called to our attention and we have found none, where the Texas Supreme [fol. 53] Court has held that after a valid decree has become final there is any power to amend it by making new or altered provisions for the financial benefit of a divorced wife except in respect to community property. The nearest approach the petitioner has made to carrying her burden to show error is found in Cannon v. Cannon, 43 S. W. (2) 134 where the Court of Civil Appeals held there was no jurisdiction to grant the petition of a divorced wife to amend the decree in respect to division of property. An appeal to the Supreme Court of Texas was dismissed for want of jurisdiction. Cannon v. Cannon, 121 Tex. 634. Under the practice then prevailing such a decision could have meant either that the Supreme Court disagreed with the reasons given in support of the judgment below or held that it actually had no jurisdiction of the appeal. However, that may be, the matter is still so left at large that the petitioner has made no clear and convincing showing that the annuity payments received in either of the taxable years here involved came within the general rule set forth in Douglas v. Willcuts, supra, and so she has failed to show that the presumptively correct decision of the Board was erroneous.

Affirmed.

L. Hand, C. J., dissents with opinion.

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L. Hand, C. J. (dissenting): We all agree that the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar. Therefore, if the taxpayer in order to escape had to show that the settlement did not discharge her husband, the Board was right; she did not do so. But the uncertainty of the law of Texas is obviously a separate issue from the actual law of Texas. Since she did show that it was un- [fol. 54] certain, she therefore succeeded if that was the only relevant issue. As I read Helvering v. Fitch, 309 U. S. 149, and Helvering v. Leonard, 310 U. S. 80, the husband is liable in these cases not only when the settlement does not discharge his marital liability, but when the law of his domicil leaves it uncertain whether the settlement has done so. For these reasons I think that the Board was wrong.

[fol. 55] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June, one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

JOSEPHINE S. PEARCE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 56] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Josephine S. Pearce v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 4, 1941. D. E. Roberts, Clerk.

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[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,634, U. S. Circuit Court of Appeals, Second Circuit, Term No. 306. Josephine S. Pearce, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed July 24, 1941. Term No. 306 O. T. 1941.

(7243)